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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL A. CORONADO,

Defendant and Appellant.

B285683

(Los Angeles County
Super. Ct. No. NA102677)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Meyer, Judge. Affirmed in part and reversed in part.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Michael A. Coronado (Coronado) of attempted murder and murder and found true gang and gun allegations. The trial court admitted incriminating statements Coronado made while in jail to an undercover agent paid to pose as an inmate and limited cross-examination of the detective who conducted the operation, which is commonly known as a *Perkins* operation.¹ On appeal, Coronado raises multiple contentions regarding the admissibility of those statements. He also contends there was insufficient evidence to support the true findings on gang allegations and that there were sentencing errors. We agree there was sentencing error and that remand is necessary so that the trial court can exercise its discretion under recent legislation giving trial courts authority to strike enhancements. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2; Sen. Bill No. 1393 (2017–2018 Reg. Sess.), Stats. 2018, ch. 1013, §§ 1–2.) We therefore reverse in part and remand for resentencing, but otherwise affirm the judgment.

BACKGROUND

I. September 7, 2015: the attempted murder of Victor Zermeno

In 2015, Zermeno lived at an apartment complex on Artesia Boulevard in Long Beach. In April 2015, several months before the incident at issue, a law enforcement officer responding to a report of a gang disturbance saw Coronado and Jeffrey Arias loitering at the complex.

¹ *Illinois v. Perkins* (1990) 496 U.S. 292, 296–297 (*Perkins*) held that conversations between incarcerated individuals and undercover agents posing as inmates do not implicate *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Months later, on September 7, 2015 at 3:00 p.m., Zermeno and Pedro Sanchez were working on Zermeno's car in a carport at the apartment building. An early 2000 dark gray or bluish BMW with paper plates drove by. The car's three to four occupants were all male Hispanics. Sanchez later identified Arias as the driver and Christian Briseno as a passenger. Zermeno had fought with Briseno, a Compton Varrios Tokers (Tokers) gang member, three months before.

Soon after the BMW passed, Coronado approached on foot and asked, "Who's Victor?" Coronado shot Zermeno once with a .22-caliber handgun, wounding him but not fatally. Soon after the shooting, Sanchez identified Coronado as the shooter from a photographic lineup.

II. September 13, 2015: the murder of Allen Pena

In 2015, Roxanna Dematias and David Rios, a Tokers gang member, were friends.² Dematias testified at trial that on September 13, 2015, just after 3:00 a.m., she drove Rios, Coronado, Pena, and a fourth man to an alley in the area of 395 East 67th Street in Long Beach. Rios and Coronado asked Pena to join them outside, at the back of the car. Minutes later, a gunshot rang out. Rios returned to the car, and a second gunshot rang out. After the second gunshot, Coronado returned to the car and told Dematias to drive. Pena never returned to the car, and he was later found dead from two gunshot wounds to the head, one to the back of his head and one to his face that went through

² Dematias testified under an immunity agreement.

his tongue.³ At some point after returning to the car, Rios said that it had to happen because if Pena went to jail, he would just do it again when he got out. By this, Rios was referring to his belief Pena had sexually assaulted Rios's cousin.⁴

Dematias identified Coronado from a photographic lineup as possibly having been in her car that night.

III. Coronado's statement and testimony

Coronado was arrested on September 18, 2015. Detective Michael Hubbard, who was investigating Pena's murder, had Coronado placed in a cell with Jose Paredes, a Mexican Mafia member who, unbeknownst to Coronado, was a paid law enforcement agent. Coronado made incriminating statements to Paredes, which were admitted and which Coronado retracted at trial. We now summarize those statements and Coronado's subsequent trial testimony.

A. *Coronado's jailhouse statement*

The conversation between Coronado and Paredes took place in English and in Spanish. Parts of the conversation are hard to decipher. However, Paredes asked Coronado if his homie had something to do with "it," and Coronado said, "Me and my homie." At 3:00 a.m. a "girl" drove them in her car to an area

³ No cartridges were found at the scene, suggesting a revolver was used.

⁴ Rios was arrested on September 22, 2015. Soon after Dematias heard about Rios's arrest, she contacted the police and gave a recorded statement that differed somewhat from her later trial testimony, in that she was ambiguous and contradictory about where the men sat in her car and whether Rios got out of the car.

that was just two blocks from Coronado's house. Coronado explained that the "fool tried to rape" his "homeboy's little cousin" and that's why he shot him, "[o]ne to the face and one to the back of the head" with a .22-caliber handgun. "We just drove fool, and we pulled him out of the car, fool," "and I [shot] him" "[i]n his face first" and then "I gave him another one [unintelligible] when he was on the ground, fool, I gave him another one to the back of the head fool." Paredes asked if there were cameras in the alley, and Coronado said no.

Paredes reassured Coronado that he would be okay so long as his homie was "solid." Paredes also warned Coronado that if his cell phone was on him at the time of the murder, it could show that Coronado was close to the victim when he was shot.

At one point during the conversation, Coronado appeared to reference the Zermeno shooting when he said, "Victor he told me, there's no Victors here [unintelligible] any Victors here?"

B. *Coronado's trial testimony*

At trial, Coronado recanted his prior statements to Paredes and denied shooting Pena and Zermeno or being present when they were shot. Coronado explained that he could not show weakness to a member of the Mexican Mafia, so he lied about his involvement in the crimes. Coronado had learned about Pena's murder from Rios and about the attempted murder of Zermeno from Arias and Briseno.⁵

⁵ Coronado admitted that when he was in the cell, nobody had told him he was a suspect in the September 7, 2015 attempted murder of Zermeno.

IV. Gang evidence

The parties stipulated that Tokers is a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A) and (C).

Sergeant Jeremy Boshnack testified for the People as a gang expert.⁶ As pertinent here, the sergeant testified that there are different levels of gang membership, from original gangsters who have been in the gang a long time, to soldiers who put in work, to shot callers who are in charge and “direct[] traffic.” To rise in rank in a gang, a member has to put in work, i.e., commit crimes, with murder being the “gold standard.” A gang’s ultimate goal is to gain respect, which they do by inciting fear. To maintain respect, if a member of one gang fights with a member of a different gang, then the loser must retaliate by coming back “harder.” Often, gang members commit crimes in groups so that there can be a lookout, a getaway driver, a shooter, and someone to get rid of the gun.

Gangs have territories. Multiple gangs, including Tokers, claim the areas in which Zermeno and Pena were shot. The alley near where Zermeno was shot is special to the gang because a Tokers member was killed there. Rios and Coronado are Tokers.

Based on hypotheticals modeled on the facts of the Zermeno and Pena shootings, the sergeant opined that such crimes would have been committed for the benefit of, at the direction of, or in association with a criminal street gang.

⁶ Martin Flores testified as a gang expert for the defense, and we discuss the relevant parts of his testimony, *post*.

V. Trial, verdict, and sentence

A jury found Coronado guilty of the first degree murder of Pena (Pen. Code, § 187, subd. (a); count 1),⁷ the attempted murder of Zermeno (§§ 664, 187, subd. (a); count 2), and two counts of possession of a firearm by a felon (§ 29800, subd. (a)(1); counts 3 [Sept. 13, 2015] & 4 [Sept. 7, 2015]).⁸ As to counts 1 and 2, the jury found true gang allegations under section 186.22, subdivisions (b)(1)(C) and (b)(5)(B) and, as to counts 3 and 4, under subdivision (b)(1)(A). The jury found true personal gun use allegations (§12022.53, subds. (b), (c), & (d)) as to counts 1 and 2.

On October 16, 2017, the trial court sentenced Coronado to 25 years to life on count 1, doubled to 50 years to life based on a prior strike that the court found true; 25 years to life for the gun enhancement (§ 12022.53, subd. (d)); one year (§ 667.5); and five years (§ 667, subd. (a)). On count 2, the trial court imposed life with a minimum parole eligibility of 15 years to life, doubled to 30 years to life; 25 years to life (§ 12022.53, subd. (d)); one year (§ 667.5); and five years (§ 667, subd. (a)). On count 3, the trial court imposed the high term of three years, doubled to six years, plus four years for the gang enhancement. On count 4, the trial court sentenced him to two years four months. The trial court imposed an additional six years to the determinate portion of Coronado's sentence for the prior convictions.

⁷ All further statutory references are to the Penal Code.

⁸ During trial, the parties stipulated that Coronado was convicted of a felony before September 7, 2015.

DISCUSSION

I. Coronado's jailhouse statements

Coronado makes three contentions about his statements to Paredes: the trial court's refusal to allow defense gang expert Flores to testify at a pretrial evidentiary hearing violated Coronado's due process rights; Coronado's statements were involuntary; and the trial court improperly limited his cross-examination of Detective Hubbard regarding the circumstances of the *Perkins* operation. After setting forth additional background, we explain why each contention is wrong.

A. *Additional background*

Before trial, Coronado moved to exclude his jailhouse statements to Paredes. In support of the motion, Coronado submitted a written statement from Flores, his gang expert witness, who said that Coronado was placed in a cell with an informant who displayed tattoos and had connections to Surenos and to the Mexican Mafia. In "the gang culture an inmate who is accountable to the Sureno rules must communicate with a rep who is asking him questions." The defense asked the court if Flores could testify at the hearing to provide information about how *Perkins* operations work. After listening to the audio recording of the conversation between Coronado and Paredes, the trial court found the proposed testimony to be unnecessary. The trial court indicated that it heard "no coercive atmosphere," as opposed to an "open" conversation between two men about the crimes they had committed. The trial court agreed there could be coercive situations in similar circumstances, but here Coronado "kept volunteering more and more information not in response to questions even asked. He just kept talking." Moreover, the trial

court had considered Flores's written statement describing his proposed testimony, noting that the statement "really lays [the defense theory] out quite well." The trial court therefore denied the defense request to have Flores testify at the hearing and admitted Coronado's statements.⁹

At trial, Detective Hubbard testified before the jury that he placed a nonlaw enforcement individual in a cell with Coronado. On cross-examination, the detective confirmed he used one agent, who received about \$1,000 in compensation. But, the trial court sustained objections to the agent's name, whether the agent was used throughout the county on a regular basis, and whether he was a gang member. At sidebar, defense counsel argued that the evidence was relevant to Flores's upcoming testimony about *Perkins* operations. Specifically, Flores would testify that the agent was a member of the Mexican Mafia and carried clout, so when the agent asks questions, you "don't refuse to answer." That is why Coronado lied to the agent about his role in the crimes, the details of which Coronado had learned from Rios and others. The trial court pointed out that the defense needed to establish Coronado knew that the agent was part of the Mexican Mafia: "None of this is relevant until your guy says, 'I was afraid, I lied,' and why he lied." Defense counsel said he understood and elected to end his cross-examination of Detective Hubbard and to recall him later.

⁹ The trial court also rejected any issue under the Sixth Amendment and section 4001.1, which concerns in-custody informants.

Coronado then testified as we summarized above; namely, knowing that Paredes was Mexican Mafia, he lied about his involvement in the crimes.

After Coronado testified, Flores testified that he had handled cases involving *Perkins* operations. He listened to the recording and recognized the agent's voice as belonging to Paredes, "one of a handful of informants who are or were . . . actually influential within the Surenos who had direct contact with" another Mexican Mafia member. Paredes is "[a]bsolutely" to be feared and obeyed, and "consequences" would result from disrespecting him. Proclaiming innocence could be a sign of disrespect or of weakness. Thus, a suspect will lie at some point to a *Perkins* agent to look strong.

After Flores testified, an alibi witness testified. The defense then rested without recalling Detective Hubbard.

B. *The pretrial hearing satisfied due process*

Coronado first contends the trial court was unable to evaluate the voluntariness of his confession because it refused to hear relevant evidence from Flores, and this refusal amounted to a violation of due process. His claim thus focuses on the sufficiency of the pretrial hearing. (See generally *Matthews v. Eldridge* (1976) 424 U.S. 319.) The hearing, however, afforded him all the process that was due. Specifically, the trial court listened to the audio of Coronado's conversation with Paredes. More to the point, the trial court also considered Flores's written report. In that report, Flores stated, "Coronado was placed in a cell with an in-custody informant who displayed tattoos and expressions of having influence within the Surenos and connections with the Mexican Mafia. In the gang culture an inmate who is accountable to the Sureno rules must communicate

with a rep who is asking him questions. The inmate cannot question the rep. The inmate cannot snitch out a fellow gang member and clean their hands. That will show weakness and make them vulnerable to harm. Although, the conversations seem casual, it is an environment of implied threat. An inmate must respect and respond to all questions asked by the rep. I am identifying the in-custody inmate as a rep with influence in the Sureno gang culture. In this conversation or what I would call an ‘implied interrogation,’ the defendant was placed in the cell for over 1 1/2 hours with repeated questions specific to the alleged murder.” This established what Flores would testify about, thereby rendering his in-court testimony at the pretrial hearing duplicative and unnecessary.

Coronado, however, maintains that Flores’s written report was an insufficient substitute for Flores’s live testimony at the pretrial hearing because the report contained no specifics about Paredes, Detective Hubbard’s practice in setting up *Perkins* operations, and how these factors influenced Coronado. However, the report *did* specify that Paredes had influence with Surenos and the Mexican Mafia. Also, it is unclear what relevance the detective’s general practice concerning such operations had to the voluntariness of Coronado’s statement. Finally, only Coronado could say what effect Paredes had on Coronado. To the extent Flores could speak to that issue, he did: he said someone in Coronado’s position “cannot snitch out a fellow gang member and clean their hands.”

We therefore conclude that the trial court did not violate Coronado’s due process rights by denying him an adequate hearing.

C. *Voluntariness of Coronado's statements*

Next, Coronado makes the related argument that the tactics Detective Hubbard used to get his confession were unconstitutionally coercive. That is, the detective did not use a friend or family member to get Coronado to talk, which courts have found to be permissible. (See, e.g., *People v. Gonzalez and Soliz* (2011) 52 Cal.4th 254 [10-year acquaintance]; *People v. Tate* (2010) 49 Cal.4th 635, 686 [defendant's girlfriend]; *People v. Jenkins* (2004) 122 Cal.App.4th 1160 [same].) Instead, the detective used an influential member of the Mexican Mafia who, by his status alone, could intimidate and coerce someone like Coronado into "confessing." We do not agree that using Paredes rendered Coronado's statements involuntary.¹⁰

Our federal and state constitutions bar the prosecution from using a defendant's involuntary confession. (*People v. Massie* (1998) 19 Cal.4th 550, 576.) The prosecution has the burden of establishing by a preponderance of the evidence the voluntariness of the defendant's confession, and courts apply a totality of the circumstances test to determine the voluntariness of a confession. (*Ibid.*) Coercion is determined from the suspect's perspective. (*Perkins, supra*, 496 U.S. at p. 296.) "When a suspect considers himself in the company of cellmates and not

¹⁰ Coronado does not argue that his Sixth Amendment right to counsel was violated. (See generally *Massiah v. United States* (1964) 377 U.S. 201.) The Sixth Amendment is "‘offense specific’" in that it applies to the subject of crimes for which "‘adversary judicial criminal proceedings have been initiated.’" (*People v. Slayton* (2001) 26 Cal.4th 1076, 1079.) Coronado had not been charged with the crimes in this case at the time he talked to Paredes.

officers, the coercive atmosphere is lacking.” (*Ibid.*) Also, deceptive practices do not undermine the voluntariness of a defendant’s statements unless the deception is of a type reasonably likely to procure an untrue statement. (*People v. Williams* (2010) 49 Cal.4th 405, 443.) Courts prohibit only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable. (*Ibid.*)

In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply the rule to the facts to determine whether the law as applied has been violated. (*People v. Gonzales and Soliz, supra*, 52 Cal.4th at p. 284.) We review the trial court’s resolution of the factual inquiry for substantial evidence, while selection of the applicable law is a mixed question of law and of fact subject to independent review. (*Ibid.*)

Paredes’s status as an influential gang member is, by itself, insufficient to establish the coercion necessary to undermine the voluntary nature of Coronado’s statements. Coronado’s willingness to share his violent exploits in great detail, often on his own initiation, demonstrates precisely the level of trust the detective hoped would be achieved by placing him in a cell with a fellow criminal. Coronado’s confession was born out of comfort, not coercion. Misplaced trust in confiding to a fellow inmate, gang member, does not render statements involuntary. (*People v. Gonzales and Soliz, supra*, 52 Cal.4th at pp. 283–284.) Indeed, the totality of the circumstances shows that the environment was noncoercive. The audio and transcript show, as the trial court pointed out, that this was two men sharing stories about crimes they committed, and that Coronado “kept volunteering more and

more information not in response to questions even asked. He just kept talking.” (Cf. *Arizona v. Fulminante* (1991) 499 U.S. 279 [informant promised protection in exchange for confession].)

Finally, to the extent Paredes’s Mexican Mafia status was relevant to Coronado’s credibility—as opposed to the voluntariness of his statements—Coronado was given every opportunity to present evidence that Paredes’s status influenced him, as we next discuss.

D. *Coronado’s cross-examination was not improperly limited*

Confronted with his incriminating statements at trial, the defense tried to establish, through cross-examination of Detective Hubbard, that Coronado lied to the undercover agent about his involvement in the crimes because he couldn’t proclaim innocence to a Mexican Mafia member. However, when defense counsel asked the detective about the agent’s name, whether the agent was used throughout the county on a regular basis, and whether he was a gang member, the trial court properly sustained relevance objections. Although Coronado now contends the trial court improperly limited cross-examination, thereby depriving him of his right to a fair trial, the record does not support that contention.

Rather, the trial court said it would reconsider its ruling if the defense established Coronado knew that Paredes was a member of the Mexican Mafia. Otherwise, evidence about Paredes was irrelevant. Defense counsel agreed and *elected* to end his cross-examination of the detective, subject to recall. Coronado thereafter testified that he knew the inmate he spoke to was from the Mexican Mafia. However, defense counsel did

not then seek to recall Detective Hubbard or otherwise raise any issue about Paredes again. The reason is clear: defense counsel chose instead to elicit the contested information from his own expert, Flores. Therefore, the defense was not precluded from eliciting evidence about the *Perkins* operation and Paredes.

Even if we assumed the trial court abused its discretion, we fail to see how Coronado was prejudiced. Violations of state evidentiary rules generally do not rise to the level of federal constitutional error. (*People v. Benavides* (2005) 35 Cal.4th 69, 91, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70.) The information defense counsel tried to elicit from Detective Hubbard was ultimately introduced through Flores. Therefore, the jury had the pertinent information to evaluate whether Coronado was merely boasting or telling the truth to Paredes.

II. Instructional error

Other than the general instructions regarding how a jury should evaluate a witness's credibility, the trial court did not instruct the jury on how to evaluate Coronado's confession. This, he claims, was error, because the trial court had a sua sponte duty to further instruct the jury on that issue. He concedes, however, that California has no model instruction about a defendant's confession, and he therefore suggests that the trial court should have crafted one using CALJIC No. 2.70¹¹ as a starting point.

¹¹ That instruction generally provides: A confession is a statement made by a defendant in which he has acknowledged his guilt of the crimes for which he is on trial. In order to constitute a confession, the statement must acknowledge participation in the crimes as well as the required criminal intent or state of mind. An admission is a statement made by a

Although a trial court is required to instruct on those general principles necessary for the jury's understanding of the case, the trial court need not instruct sua sponte on specific points or special theories that might be applicable to the particular case. (*People v. Owen* (1991) 226 Cal.App.3d 996, 1004–1005.) Also, a trial court has no sua sponte duty to revise or to improve upon an accurate statement of law without a request from counsel, and a failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. (*People v. Lee* (2011) 51 Cal.4th 620, 638.)

The jury here was adequately instructed on how to evaluate a witness's testimony and credibility via CALCRIM Nos. 200 (duties of judge and jury), 222 (evidence), 223 and 224 (direct and circumstantial evidence), 226 (witnesses), 302 (conflicting evidence), 358 (evidence of defendant's statements), and 359 (independent evidence of a charged crime).

Coronado cites no authority for the proposition that these instructions provide inadequate guidance for a jury to evaluate a defendant's confession. The authority he instead cites, for example, *Crane v. Kentucky*, *supra*, 476 U.S. at pages 690–691, does not help him. *Crane* held that a defendant is entitled to present evidence his confession was coerced. *Crane* did not

defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. You are the exclusive judges as to whether the defendant made a confession, and, if so, whether that statement is true in whole or in part. Evidence of an oral confession of the defendant not contained in an audio or video recording and not made in court should be viewed with caution.

address the issue here, whether a trial court has a sua sponte duty to instruct on the reliability of confessions.

III. Possession of a firearm

The jury convicted Coronado of two counts of felon in possession of a firearm based on the September 7 and 13, 2015 shootings. However, where, as here, the evidence establishes that the gun possession was an uninterrupted, continuing offense, only one conviction may stand. (*People v. Mason* (2014) 232 Cal.App.4th 355, 365–367.) The evidence here is that Coronado arrived at the crime scenes already armed. The People concede. We therefore reverse the conviction on count 3.

IV. Section 654

Coronado also contends that the sentences on counts 3 and 4 should have been stayed under section 654. The contention is moot as to count 3 because we have reversed that conviction. We reject the contention as to count 4.

Section 654 provides that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).) The section thus bars multiple punishment for offenses arising out of a single occurrence where all were incident to an indivisible course of conduct or a single objective. (*People v. Correa* (2012) 54 Cal.4th 331, 335.) But, if the defendant harbored multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an

otherwise indivisible course of conduct. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143–1144.) We review for substantial evidence whether the facts and circumstances reveal a single intent and objective. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1414.)

The jury convicted defendant of being a felon in possession of a firearm under section 29800, subdivision (a)(1). The elements of this offense are conviction of a felony and ownership or knowing possession, custody, or control of a firearm. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1052.) The offense is completed once the intent to possess is perfected by possession. (*People v. Jones, supra*, 103 Cal.App.4th at p. 1146; § 29800, subd. (a)(1).) Where, as here, the only evidence is the defendant arrived at the crime scene already in possession of the firearm he then uses to commit another crime, the firearm possession is a separate and antecedent offense. (Compare *Jones*, at pp. 1141, 1143–1145 with *People v. Bradford* (1976) 17 Cal.3d 8, 22 [defendant used gun wrested from police officer to shoot officer; § 654 applied].) As to the attempted murder of Zermeno, the evidence shows Coronado already had the gun when he approached and shot Zermeno. No evidence shows that “‘fortuitous circumstances’ ” put the firearm in Coronado’s hands at the instant of trying to kill Zermeno. (*Jones*, at p. 1144.) Section 654 does not apply.

V. Sufficiency of the evidence to support the gang allegation

Coronado contends there was insufficient evidence to support the true findings on the gang allegations as to the attempted murder of Zermeno (count 2) and his firearm

possession on the day he committed that crime (count 4).¹² We disagree.

The standard to determine whether the evidence was sufficient to sustain a gang enhancement is the same as whether to sustain a criminal conviction. “ “[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” ’ ’ (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v. Albillar* (2010) 51 Cal.4th 47, 59–60 (*Albillar*).) “We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence.” (*People v. Medina* (2009) 46 Cal.4th 913, 919.)

Section 186.22, subdivision (b)(1), imposes additional punishment for a “person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” The enhancement thus requires the prosecution to establish two things: first, the crime was gang-related and, second, it was committed with the aforementioned specific intent. (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484.) Here, Coronado focuses on the second prong, which requires a “specific intent to

¹² Because we have reversed Coronado’s conviction on count 3, felon in possession of a firearm on the day of Pena’s murder, we need not address sufficiency of the evidence to support the attached gang allegation as to that count. Coronado concedes there was sufficient evidence to support the true finding as to count 1, the murder of Pena.

promote, further or assist criminal conduct by *gang members*.” (*Albillar, supra*, 51 Cal.4th at p. 67.) A specific intent to benefit the gang is not required, only a specific intent to assist other gang members in any criminal conduct. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) When a gang member commits a crime with other gang members, that may be sufficient evidence of specific intent. (*Albillar*, at p. 68; *People v. Miranda* (2011) 192 Cal.App.4th 398, 412; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.)

There is evidence Coronado committed the attempted murder of Zermeno with other gang members. Minutes before Coronado shot Zermeno, Coronado was in a car with, among others, Briseno. Sanchez identified Briseno as a Toker. Coronado was therefore with a fellow gang member when he committed the crime.

Moreover, Briseno and Zermeno had fought with each other a few months before. Just before Coronado shot Zermeno, Coronado asked, “Who’s Victor?” This suggests that Coronado targeted Zermeno in retaliation for the earlier altercation with Briseno. Gang expert Boshnack’s testimony supported this gang motive for the crime. He testified that a gang member who loses a fight will have to retaliate by coming back “harder.” Thus, there was sufficient evidence that Coronado committed the crime with other gang members *and* with the specific gang-related purpose of retaliating for the fight Zermeno had with Coronado’s fellow gang member.

This evidence also establishes that Coronado possessed a gun on September 7, 2015, the day of Zermeno’s attempted murder, with the specific intent to promote, further, or assist in any criminal conduct by gang members. Sanchez identified the

gun used to shoot Zermeno as a .22-caliber handgun. Per Coronado's jailhouse statement, Coronado also used a .22-caliber handgun to murder Pena. The reasonable inference from this evidence is that Coronado used the same gun to commit both crimes. From this inference flows the conclusion that Coronado possessed—and used—the gun to carry out gang-related crimes. Further, as to Coronado's specific argument that the gang expert was not expressly asked about the gun possession crimes, his failure to opine specifically on that issue does not render the evidence insufficient to support the gang allegation. To say that Coronado's attempt to murder Zermeno fell within the meaning of the gang statute but not his possession of the gun he used to commit that crime is nonsensical.

VI. Cumulative error

Coronado contends that the cumulative effect of the purported errors requires reversal. As we have found no errors to accumulate, we reject this cumulative error claim. (See generally *People v. Woodruff* (2018) 5 Cal.5th 697, 783.)

VII. Sentencing

Coronado's sentence includes terms for firearm enhancements under former section 12022.53 and for a prior serious felony conviction under former section 667, subdivision (a). When Coronado was sentenced in 2017, the trial court lacked discretion to strike those enhancements. As we now explain, recent legislation grants trial courts the discretion they once lacked.

Effective January 1, 2018, the Legislature amended section 12022.53 to give trial courts authority to strike section 12022.53 firearm enhancements in the interest of justice.

(Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.) Effective January 1, 2019, the Legislature amended sections 667, and 1385 to allow trial courts to exercise discretion to strike or to dismiss a prior serious felony conviction for sentencing purposes. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.), Stats. 2018, ch. 1013, §§ 1–2.) These amendments apply to cases, such as this one, that were not final when the amendments became operative. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972; *People v. Watts* (2018) 22 Cal.App.5th 102, 119.)

Notwithstanding retroactivity, the People contend that remand for resentencing is unnecessary because the record shows that the trial court would not have stricken any firearm enhancement had it known it had discretion to do so. However, the trial court merely acknowledged at sentencing that it had “zero discretion on counts 1 and 2” and that the only discretion it had was as to the one-year priors. The trial court declined to strike the one-year priors and, moreover, sentenced Coronado consecutively on counts 3 and 4. The People interpret these sentencing choices as a clear intent to sentence Coronado to the maximum possible sentence. We do not agree. That the trial court chose not to exercise its discretion as to one or two parts of the sentence does not mean it would make the same choice as to another part, given the choice.

Remand therefore is necessary to allow the trial court an opportunity to exercise its sentencing discretion under the amended statutes. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) We express no opinion about how the trial court’s discretion should be exercised on remand.

DISPOSITION

The conviction on count 3 is reversed. The sentence is vacated and the matter is remanded for resentencing. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.